

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

(Stockton, California)

ST. JOSEPH'S BEHAVIORAL
HEALTH CENTER¹

Employer

and

Case 32-RC-4902

HEALTH CARE WORKERS UNION,
LOCAL 250, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO²

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly being filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

¹ The name of the Employer appears as corrected at the hearing.

4. Petitioner claims to represent certain employees of the Employer, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Petitioner seeks to represent a unit consisting of all full-time and regular part-time registered nurses (RNs) employed at the Employer's Stockton, California facility excluding guards, and supervisors as defined by the Act. The Employer contends, however, that all of its RNs are supervisors within the meaning of the Act and thus the petition should be dismissed.

THE FACTS

The Employer is a 35 bed acute psychiatric hospital located in Stockton, California. The hospital is divided into three units: an 11 bed intensive treatment unit (ITU), an 8 bed cognitive behavioral unit (CBU) and a 16 bed gero-psychiatric unit (GBU). Jim Sondecker is the Employer's President/Regional Director and responsible for the operation of the entire facility. Joan Stevens is the Manager of Patient Care/Director of Nursing (DON). There are three house supervisors, one assigned and responsible for each shift. The parties stipulated and I find that the three house supervisors are statutory supervisors within the meaning of the Act.³ The hospital employs approximately 100 employees, including RNs, licensed vocational nurses (LVNs), licensed psychiatric technicians (LPTs), mental health workers, and unit clerks.

Administrative Assistant Josephine Martinez prepares a monthly schedule for the three units as well as a daily staffing sheet for the units. The nursing staff operates on

² The name of the Petitioner appears as corrected at the hearing.

³ At the start of the hearing the three regular house supervisors were Joan Stevens, Loel Arroyo and Alita Velarde. About a week before the second day of the hearing, Stevens was promoted to the DON position. The record is silent as to whether Stevens supervisory position has been filled.

three shifts: the day shift is from 7 a.m. to 3:30 p.m.; the PM shift is from 3 p.m. to 11:30 p.m.; and the night shift is from 11 p.m. to 7:30 am. The staffing sheets for a particular day are distributed to each unit the night before the day covered by the sheet. These sheets indicate not only the staff assigned for each unit on each shift but also which of the licensed staff will be acting as charge nurses⁴ as well as who is the house supervisor or relief house supervisor for each shift.

The Employer currently employs five RNs as staff nurse/charge nurses, herein called staff nurses who are at issue in this case. They are Billie Shuler, Harriet Leander, Tejander Kaur, Evangeline Roxas and Tita Sevilla. Shuler, Roxas and Kaur are regularly scheduled part-time. Leander is full time and Sevilla is per diem, which means she works a minimum of six shifts per month. These are the only RNs employed at the hospital who are not stipulated supervisors.

The staff nurse job description indicates, and the record as a whole establishes, that it is one of the duties of the staff nurse to work as relief house supervisor and fill in for the regular house supervisors on their days off and on the weekends.⁵ The parties stipulated that during the first six and a half months of the current year, at least one staff nurse filled in for a regular house supervisor on 124 out of the 204 days. The Employer's President Jim Sondecker testified that Roxas worked as a relief house supervisor 98% of the time that she worked at the facility; Kaur 75%; Leander 71%; Shuler 37%; and Sevilla 36%.

When working as a relief house supervisor, a staff nurse's principal duty is to maintain proper staffing levels pursuant to the Employer's "Multidisciplinary Staffing

⁴ Both RNs and LVNs work as charge nurses.

⁵ Only the five staff RNs fill in for the house supervisors.

Guidelines,” copies of which are kept in each unit.⁶ The guidelines specify the number of employees in each classification that are required in each of the three units on each shift based on patient census.⁷ If an employee calls in sick or has a family emergency it is the responsibility of the house supervisor or relief house supervisor to find a replacement. While no staff is on call, the house supervisor and relief house supervisor follow an unwritten protocol when seeking to replace an employee. This protocol includes trying to replace the missing employee with someone with the same license and with someone who can work without incurring overtime. However, if no one is available who can work without overtime, the house supervisor and the relief house supervisor have the authority to call in a person who will incur overtime. If all else fails, the house supervisor or relief house supervisor is authorized to call a registry for a replacement employee. Relief house supervisors sometimes call Administrative Assistant Martinez if they have a staffing problem or if they are too busy to do the calling themselves. Sometimes a relief house supervisor will ask a unit clerk to make the replacement calls for her if she is too busy to make them herself and Martinez is unavailable. A binder that is kept by the house supervisors and passed to the relief house supervisors when they are filling in contains, among other things, a list of the nursing staff employees, their classifications and phone numbers. DON Joan Stevens testified that when she was working as a house supervisor and needed to call a replacement she never chose one LVN over another or one LPT over another based on their individual skill levels because all the LVNs are

⁶ There are also state laws that require that a RN be on duty on every shift and that one licensed employee be on duty in each unit on every shift. The licensed employees include LVNs and LPTs as well as RNs.

⁷ These guidelines (there is one for ITU and CBU and one for GPU) allow for the exercise of a very limited discretion on maintaining staffing levels in that they allow for calling in a specified number of additional staff at certain census levels based on acuity.

equally competent as are all the LPTs; she would just call one that she believed was available and had not already worked that day.

Once the monthly schedule is distributed to the staff, if a nursing staff employee wants to take a day off, it is that employee's responsibility to find a replacement for the shift to which they are assigned. This can be done by trading shifts or by getting another staff member to take the shift. In either case, the employee is required to complete and submit a Schedule Change Request and have it signed by a house supervisor. While such forms are submitted from five to ten times a month, the Employer submitted only three such forms which were signed by relief shift supervisors during the first six and a half months of this year.

When staff nurses work as relief house supervisors on weekends and PM and night shifts, there are no stipulated supervisors on duty in the facility. However, at all times during these periods, there is a administrator on call (AOC) and available at all times by phone. The Employer maintains copies of its policies and procedures manual in each unit.

The staff nurses punch a time clock, are paid hourly and are eligible for overtime. The evidence in the record regarding whether house supervisors are salaried or paid hourly is conflicting. It is clear that they are paid biweekly for 80 hours and do not receive overtime if they work more than the 80 hours, but they may receive compensatory time. The pay range for staff nurse/charge nurse is from \$20.24 to \$27.32 per hour and for the regular house supervisor is \$21.84 to 29.45per hour. When a staff nurse works as a relief house supervisor she is paid an additional \$1 an hour. The house

supervisors share an office but the relief house supervisors do not have access to this office.

POSITIONS OF THE PARTIES

The Employer contends that the petition should be dismissed because the five RNs at issue are statutory supervisors. In this regard, the Employer asserts that all five RN's while acting as relief house supervisors exercise independent judgment in the interest of the Employer in: (1) assigning and directing other staff; (2) exercising disciplinary authority including counseling, terminating and dismissing employees; (3) participating in hiring staff; (4) evaluating other staff members; (5) supervising patient care; (6) authorizing overtime; and (7) attending staff meetings.

The Petitioner argues that the Employer has failed to meet its burden to establish that the five staff nurses use independent judgment in the exercise of any of the indicia of supervisory authority.

ANALYSIS

The party asserting that individuals are supervisors under the Act bears the burden of proving their supervisory status. *NLRB v. Kentucky River Community Care*, 121 S.Ct. 1861 (2001); *Youville Health Care Center, Inc.*, 326 NLRB 495 (1998); *Bennett Industries, Inc.*, 313 NLRB 1363 (1994); *Tuscon Gas and Electric Co.*, 241 NLRB 181, 181 (1979). The possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to establish supervisory status, provided that such authority is exercised in the employer's interest, and requires independent judgment in a manner which is more than routine or clerical. *Harborside Healthcare, Inc.*, 330 NLRB No. 191 (2000); *Youville Health Care Center, Inc.*, *supra.*; *Hydro Conduit Corp.*, 254 NLRB 433, 437

(1981). The exercise of some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner, however, does not confer supervisory status on employees. *Chicago Metallic Corp.*, 273 NLRB 1677 (1985); *Advanced Mining Group*, 260 NLRB 486, 507 (1982). Because supervisory status removes individuals from the protection of the Act, only those personnel vested with "genuine management prerogatives" should be considered supervisors, and not "straw bosses, leadmen, set-up men and other minor supervisory employees." S.Rep.No. 105. 80th Cong. 1 Sec. 4 (1947); *Ten Broeck Commons*, 320 NLRB 806, 809 (1996). Whether nurses possess supervisory authority is analyzed on a case-by-case basis using the same criteria applied to workers in other occupations. *Kentucky River*, supra; *Ten Broeck Commons*, supra at 809-810. *Providence Hospital*, 320 NLRB 7171 (1996), enfd. sub nom. *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir. 1997); see also *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 583 (1994). In the instant matter, the Employer has failed to establish the supervisory status of the RNs in question.

POWER TO ASSIGN

The Employer asserts that staff nurses when acting as relief house supervisors are supervisors because they have the authority to assign employees. More specifically, the Employer asserts that: relief house supervisors are required to maintain staffing levels which may require that they call in employees to replace employees who are sick or have family emergencies; they have the authority to reassign staff to equalize work on the units; they have the authority to and have approved schedule change requests; and they have the authority to and regularly approve overtime for other employees. However, the

record does not establish that the staff nurses when acting as relief house supervisors exercise independent judgment when they assign employees.

The record shows that relief house supervisors maintain staffing levels only within very narrowly defined boundaries. Thus, the monthly and daily work schedules are created by Administrative Assistant Martinez with no input from the relief house supervisors and the relief house supervisors must follow the Employer's staffing guidelines that allow for the exercise of very limited discretion.

Furthermore, the fact that the relief house supervisors regularly attempt to obtain replacements for scheduled employees who have called in sick or cannot work their assigned shift for other reasons does not establish that they are statutory supervisors. In this regard, as noted above, in seeking replacements, relief house supervisors follow a well established if informal protocol on the order in which to call in replacements. Furthermore, the Employer has not established that the abilities of the employees in the same classification significantly vary such that the relief house supervisor would have to exercise independent judgment to determine whom to call as a replacement. To the contrary, DON Stevens testified that in her judgment all the LPNs and LPTs are equally competent so relief house supervisors are not called upon to weigh the skill levels of employees in a particular job classification before deciding whom to call in. Thus, such assignments appear routine and clerical in nature and not supervisory. *Providence Hospital*, supra at 732; *Clark Machine Corp.*; 308 NLRB 555, 5655-556 (1992). Moreover, there is no evidence that the relief house supervisors have the authority to require someone to come to work to replace another employee. Without the authority to require a worker to come to work, the calling in of replacement workers is merely routine

and does not confer supervisory status. *Providence Hospital*, supra, at 727; see *Harborside Healthcare, Inc.*, 330 NLRB No. 191, slip op. at 3 (April 24, 2000). Similarly, the authority of relief house supervisors to authorize overtime in order obtain replacement workers or to maintain staffing guidelines does not confer on them supervisory status because they do not have the authority to require anyone to work overtime. *Providence Hospital*, supra at 727.

Regarding the authority to move staff between units, President Sondecker testified that relief house supervisors have the authority to and regularly do “float” staff between units at their own discretion in response to overstaffing or understaffing on the units as the result of acuity and admissions. Since what constitutes understaffing and overstaffing is clearly defined by the Employer’s staffing guidelines, this task is also routine and does not require the use of independent judgment. Thus, in *Providence Hospital*, the Board held that work assignments made to equalize work or made on another “rational basis” do not demonstrate the exercise of independent judgment, supra, at 727.⁸ In the instant case, the reassigning of employees based upon the Employer’s guidelines would constitute another rational basis.

Similarly, the evidence regarding the authority of the relief house supervisors to approve Schedule Change Requests forms that are submitted to them does not demonstrate the exercise of independent judgment in assigning employees. While the record establishes that the Employer receives between four and ten of these forms a month, the record shows that only three such forms were signed by relief house supervisors during the first six and a half months of this year indicating, at most, only sporadic approval of such forms by the relief house supervisors. Furthermore, there is no

evidence that a relief house supervisor has ever refused to approve such a request and no evidence of what criteria a relief house supervisor would be expected to consider in deciding whether to approve or reject a schedule change request. In these circumstances, the sporadic approval of Schedule Change Request forms by relief house supervisors appear to be merely routine or perfunctory in nature and such approval does not demonstrate the exercise of independent judgment.

In sum, the evidence in the record is insufficient to establish that relief house supervisors exercise independent judgment when assigning other employees.

POWER TO EVALUATE

The Employer contends that the relief house supervisors evaluate employees on their shifts. However, the record clearly establishes that both the regular house supervisors or managers and not the relief house supervisors prepare the employee evaluations, and, that at most, a relief house supervisor may be asked on occasion by the evaluator for her opinion of a particular employee's work.⁹ There is no evidence regarding whether other employees are also asked for their input or what role the relief house supervisors input actually plays in the ultimate evaluations that are prepared. While the Employer also contends that the relief house supervisors can approve wage increases from between zero and five percent, the record contains no evidence that relief house supervisors approve wage increases. Instead, the record establishes only that relief house supervisors may provide input to the actual evaluator who then prepares the

⁸ See also *Ohio Masonic Home*, 295 NLRB 390, 395 (1989).

⁹ President Sondecker testified that a unit clerk by the name of Shiela Grey recently informed him that staff nurse Billie Schuler prepared her performance evaluation last year. The Employer did call Ms. Grey as a witness nor did it introduce her evaluation. In these circumstances, I find the evidence as to whether Schuler actually prepared Grey's evaluation to be inconclusive. Since it is the Employer's burden to prove supervisory status, I find that the Employer has failed to establish it based on the alleged authorship of Grey's evaluation. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

evaluation which may lead to a raise of zero to five percent. There is also no evidence in the record that a relief house supervisor has ever been asked her opinion about what wage an employee should receive. In the absence of any evidence that the input from relief house supervisors affected employees' evaluations or wage increases in a direct or systematic way, the role of the relief house supervisors in the evaluations of other employees and the determination of wage increases does not establish supervisory status. *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426, 427 (1998).

POWER TO HIRE

The Employer contends that the five staff nurses are supervisors because of the role they play in the hiring of new employees. However, the record merely establishes that on occasion relief house supervisors, as well as other admittedly non supervisory employees, may be asked to sit in on a panel interview of an applicant for hire for certain positions. The record is quite clear that the actual hiring decisions are made by the regular house supervisors and the DON. Based on this evidence it cannot be concluded that relief house supervisors play a sufficient role in the hiring of new employees to establish supervisory status.

POWER TO DIRECT

The Employer contends that the relief house supervisors are statutory supervisors because they are responsible for the delivery of patient care which includes responsibly directing the work of other employees. In support of this contention, the Employer enumerated several examples of relief house supervisors' duties.

First, the Employer contends that relief house supervisors coordinate and direct the activities of other nursing personnel. In support of this contention, the Employer

relies on one statement to that effect in an attachment to the job description of the regular house supervisor. The record is devoid of specific examples of how, and when, and in what circumstances, relief house supervisors direct the activities of other nursing personnel. Absent detailed evidence of the exercise of independent judgment in directing other employees, conclusionary statements, like the one relied upon by the Employer, without supporting evidence are insufficient to establish supervisory status. See *Quadrex Environmental Co.*, 308 NLRB 101, 102 (1992) (citing *sears Roebuck & Co.*, 304 NLRB 193 (1991)).

The Employer also asserts that relief house supervisors direct the patient care provided by mental health workers. The Employer relies on one conclusionary statement to that effect made by President Sondecker to support this contention. The record is devoid of any examples of relief house supervisors exercising the authority to direct the work of mental health workers. Accordingly, it cannot be concluded based solely on this conclusionary statement that relief house supervisors exercise sufficient judgment in directing the work of mental health workers to warrant a finding that the nurses are supervisors as defined in the Act.

Further, the Employer contends that relief house supervisors provide clinical evaluations of patients. While the Employer relies solely on the conclusionary testimony to that effect by Sondecker, it fails to explain, why, even if they do such evaluations, such is an indicia of supervisory status. Even assuming that relief house supervisors regularly perform such evaluations and exercise considerable judgment in assessing patients' conditions, such evaluations would represent the exercise of relief house supervisors professional medical judgment as RNs and does not constitute, as the Employer asserts,

the exercise of independent judgment to direct the work of other employees. *Providence Hospital*, supra at 733.

The Employer contends that the relief house supervisors have the authority to send a patient who is experiencing a medical emergency to an off-site emergency room for treatment and that the decision as to how to transport the person involves the exercise of supervisory authority. The scant evidence in the record on this issue shows that when there is a medical emergency, the house supervisor or relief house supervisor must assess the acuity of the medical crisis in order to determine whether to call 911 or an ambulance service to transport the patient to the emergency room. The Employer does not explain why the exercise of what is clearly the nurse's medical judgment would bestow supervisory status on the relief house supervisors. As discussed above, the exercise of the nurse's professional medical judgment, by itself, does not confer supervisory status on the relief house supervisors.

The Employer also contends that between the hours of 11:00 p.m. and 7:00 a.m., if a relief house supervisor has to send a patient to an off-site emergency room, the relief house supervisor is required to contact a crisis assessment worker and to direct the worker to go to the emergency room to help the patient get the proper treatment. There are no crisis assessment workers scheduled on the 11 p.m. to 7 a.m. shift and they have to be contacted through their pagers. Since the Employer's policy requires the house supervisor and relief house supervisor to contact and direct the crisis assessment worker whenever a patient is sent to the emergency room between the hours of 11 p.m. and 7 a.m., the exercise of this authority is routine and does not require the degree of independent judgment required of a supervisor.

Finally, the Employer also contends that the fact that relief house supervisors are alerted to patient admissions to the hospital during their shifts so that they can adjust staffing levels if necessary establishes that relief house supervisors use independent judgment to direct other employees. For the reasons discussed above [pages 7-9] on the power to assign, in the circumstances of this case, the exercise of such authority is merely routine and is insufficient to establish supervisory status under the Act.

In sum, contrary to the Employer's contentions, the record as a whole fails to establish that relief house supervisors exercise independent judgment in the directing of the work of other employees.

POWER TO DISCIPLINE

The Employer contends that relief house supervisors have the authority, and have, exercised the authority to discipline employees up to and including termination. In support of this contention, the Employer introduced evidence regarding five incidents involving only one relief house supervisor, Billie Schuler, allegedly disciplining or effectively disciplining other employees. The Employer introduced no evidence whatsoever regarding the other four staff nurses disciplining employees while acting as relief shift supervisors.

In the first incident, the Employer asserts that in April 2001, Billie Schuler filled out an Employer Occurrence Report Form and counseled an unnamed employee for failing to give a patient her medication. The record establishes that on or about April 21, 2001, Schuler discovered that an employee had written an eye drop order for a particular patient not only on that patient's chart but also on another patient's chart by mistake. When Schuler discovered the error, she advised the employee of her mistake and later

completed an Occurrence Report Form documenting the error and the fact that she had “counseled” the errant employee and gave the report to one of the regular house supervisors. The record also establishes that all employees, not only house supervisors and relief house supervisors, are required to report occurrences that they observe that violated the Employer’s policies and procedures which are set forth in the manual kept in each unit. There is no evidence that Schuler’s report led to any discipline of the employee involved. In these circumstances, the Employer has failed to demonstrate that Schuler exercised any disciplinary authority in this incident. Instead, she merely reported an incident which she discovered to the Employer as required by the Employer’s policies and procedure manual and informed the employee involved of his or her error.¹⁰

The second incident involves the issuing of a written warning to employee Leslie Clark and the evidence regarding this incident is conflicting. The Employer introduced a disciplinary action report dated April 11, 2001 signed by Jim Sondecker which indicated that Clark had been given a 1st warning for spreading false rumors. Sondecker testified that Schuler informed him of Clark’s conduct and recommended that she be disciplined, a recommendation that he followed without further investigation. At the hearing, Schuler denied Sondecker’s account of her role in Clark’s discipline and denied that she had recommended that Clark be disciplined.

The third incident involves the termination of LPT Dorothy Patterson. The evidence regarding the role of staff nurse Schuler in the termination of Patterson is also in

¹⁰ While not mentioned in its brief, the Employer introduced evidence at the hearing that Schuler filled out another Occurrence Report Form on May 31, 2001 reporting another violation of the Employer’s policies and procedures; in this case, other staff nurses failing to immediately report to her when she was acting as relief shift supervisor that an employee had called in sick and would not report for a scheduled shift. In that incident the regular house supervisor counseled the employees involved about proper procedure. Again, there was no evidence introduced that this report led to discipline and Schuler did not recommend any discipline in the report.

conflict. There is no conflict on some of the basic background facts. On April 3, 2001 when Schuler was acting as the relief shift supervisor she assigned Patterson to distribute medications on the CBU because the nurse assigned to that unit was involved in grand rounds.¹¹ Normally, the daily sheet would indicate who was to fill in for the CBU nurse during grand rounds but this day it did not and Schuler asked Patterson, who was assigned to the ITU that day, to distribute the medications. Later that day, Schuler learned that Patterson had gone to the CBU as instructed but had had two Delta College students who were working on that unit distribute the medications to all the patients. This violated the Employer's policies and procedures as well as the contract between the Employer and Delta College which set the conditions under which the Delta students work at the hospital. Either at the end of her shift or the next day, Schuler informed Jim Sondecker of Patterson's actions with the medications and some other performance problems with Patterson that arose on April 3. Subsequently, Patterson was terminated by Sondecker. While Schuler did not fill out a Occurrence Report regarding the Patterson incidents, at some point after April 3, she wrote up an informal report of the incidents and gave it to Sondecker.

The disputed evidence relates to whether Schuler recommended to Sondecker that Patterson be fired. Sondecker testified that on April 3 when Schuler told him of the incidents about Patterson she told him that Patterson should be fired and that he decided to fire Patterson based on Schuler's recommendation without any further investigation. He testified that he made the decision to fire Patterson on April 5, a day on which Schuler did not work. At the hearing, Schuler emphatically denied that she made any

¹¹ Supervisory authority does not include the authority to direct others to perform discrete tasks such as Schuler's direction of Patterson to distribute medications to patients in the CBU. *Kentucky River*, supra at

recommendation to Sondecker regarding disciplining Patterson. Instead she testified that she merely reported the incidents to Sondecker and suggested that he keep an eye on Patterson and that he responded that he would follow up on her report. She also testified that on or about April 6, Sondecker told her that he had talked to one of the LPTs that was on duty on April 3 and that person had corroborated Schuler's report about Patterson and had filed an Occurrence Report about the incidents. As a result he had decided to terminate Patterson. She further testified that she gave Sondecker the written report after he told her that he had fired Patterson. This report makes no recommendation regarding whether Patterson should be disciplined. When Sondecker first testified at the hearing, he stated that he could not remember if another LPT had filed an occurrence report about Patterson. When he testified again at the end of the hearing he stated that no one else had filed any reports about Patterson and he testified that he received the written report from Schuler prior to making the decision to terminate Patterson. Sondecker also testified that Schuler never recommended the termination of anyone other than Patterson.

The fourth and fifth incidents involve the dismissal/failure to recall registry nurses and the evidence on these incident is also conflicting. Sondecker testified that although he could not recall the specifics, Billie Schuler had dismissed two registry nurses within the six months prior to the hearing, one mid shift and the other at the end of the shift, solely on her own authority. Sondecker testified that regarding the nurse dismissed at the end of her shift, Schuler contacted him and told him that they should never use that registry nurse again and they followed her recommendation. With the other, he testified that Schuler was working as the relief shift supervisor on the day in question and sent the registry nurse home even before the end of her four hour minimum that the Employer is

1871; *Providence Hospital*, supra at 729.

required to pay any registry nurse that is called in. He also testified that Schuler did not tell him of the incident until she had already sent the nurse home.

Regarding the registry nurse dismissed at the end of her shift, Billie Schuler disputed Sondecker's account of the incident. Schuler identified the registry nurse in the first incident as "Dixie" and testified that there were actually incidents on two days involving Dixie's performance. On the first day at the end of her shift Schuler who was working as a staff nurse reported to the P.M. house supervisor Loel Arroyo that Dixie was not able to do the minimum amount of work expected of a nurse. Arroyo told her that there was nothing that could be done and that Schuler would have to live with Dixie because she was scheduled to work 12 more shifts. On the second day, when she observed Dixie giving a patient 12 100 mg vitamins, Schuler, who was acting as relief house supervisor that day, suggested to Dixie that she give should have given the patient 3 400 mg tablets instead because it would be easier for the patient. In response to Schuler's comments, Dixie became very agitated and began yelling and screaming at Schuler and started calling her registry. At that point, the doctor who was on duty that day asked Schuler what she was going to do about Dixie's disruptive behavior and she said nothing and explained what Arroyo had said to her the night before. Then the doctor said that he was going to talk to Sondecker. Shortly thereafter, Sondecker came to the unit and told Schuler that he understood she had some concerns about Dixie. He asked her if she wanted Dixie to leave then or wait to the end of the shift and Schuler said that Dixie might as well stay to the end of the shift. While Schuler testified that Dixie did not return to the hospital after that day, she stated that she did not decide not to call Dixie back or tell her not to come back.

Regarding the registry nurse sent home in the middle of her shift, Schuler also disputed Sondecker's account on critical points. The record identifies the registry nurse involved as Sabrina White. According to Schuler, she was acting as relief house supervisor on day shift on the day in question. At some point during the morning, White told Schuler that she could not handle her assignment but apparently Schuler told her she needed to complete the work she was assigned. Later that morning, Josephine Martinez called Schuler and told her that White told her (Martinez) that she could not do the job and was taking exception with Schuler asking her to complete her work. Martinez gave Schuler the option of sending White home. At that point, Schuler spoke to the charge nurse on the unit involved who advised Schuler that she could manage the unit without White for the rest of the day. Schuler then told White that she could go home. She testified that if Martinez had not given her permission to send White home, she would not have had the authority to send White home on her own. While Schuler admitted that White has not worked at the hospital since that day, she testified that Martinez told her she would deal with the registry about White.

The Employer provided no evidence whatsoever that any of the other four staff nurses ever disciplined or effectively recommended the discipline of other employees. In addition, as discussed above, the Employer has failed to establish that any of five staff nurses are supervisors based on any other indicia. In view of these circumstances, and the record as a whole, I find that the Employer has failed to establish that Harriet Leander, Tejander Kaur, Evangeline Roxas and Tita Sevilla are supervisors within the meaning of the Act. Accordingly, I shall include them in the unit herein.¹²

¹² The Employer contends that most if not all relief shift supervisors have attended some non-mandatory supervisory meetings. The evidence on this point is conflicting and inconclusive. Moreover, even if all the

In view of the conflicting evidence in the record on the critical issue of whether Billie Schuler disciplined or effectively disciplined employees or effectively recommended the dismissal of registry nurses, I will defer the resolution of this issue by letting Schuler vote subject to challenge. If Schuler's vote is determinative, the issue will be resolved by way of a post-election hearing.

There are approximately five (5) employees in the voting group.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.¹³ Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election

staff nurses attended regular supervisory meetings, this would not establish by itself that they are supervisors. Instead, the Board has long held that the attendance at supervisory meetings is a secondary indicia of supervisory status and that secondary indicia are by themselves insufficient to establish supervisory status. *J.C. Brock Corp.*, 314 NLRB 157, 159 (1994).

¹³ Please read the attached notice requiring that election notices be posted at least three (3) days prior to the election.

date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented by Health Care Workers Union, Local 250, Service Employees International Union , AFL-CIO.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359, 361 fn. 17 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, on or before August 24, 2001. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board,

addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570.

This request must be received by the Board in Washington by August 31, 2001.

Dated at Oakland California this 17th day of August, 2001.

James S. Scott, Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, California 94612-5211

32-1227

Digest Numbers:

177-8501-2400
177-8501-4000
177-8520-0100
177-8520-0800
177-8520-1600
177-8520-2400
177-8520-4700